Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS	)))))	WT Docket No. 03-128

To: The Commission

JOINT REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC., T-MOBILE USA, INC. AND WESTERN WIRELESS CORPORATION

Gene A. DeJordy
Vice President of Regulatory Affairs
Western Wireless Corporation
3650 – 131st Ave., S.E., Suite 400
Bellevue, WA 98006
(425) 586-8700

William J. Hackett
Director of Regulatory Compliance
Western Wireless Corporation
401 9th Street, N.W., Suite 550
Washington, DC 20004
(202) 654-5980

Thomas J. Sugrue
Vice President - Government Affairs
T-Mobile USA, Inc.
401 9th Street, N.W.
Suite 550
Washington, DC 20004

Dan Menser
Senior Corporate Counsel
Shannon Reilly
Corporate Counsel
T-Mobile USA, Inc.
12920 S.E. 38th Street
Bellevue, WA 98006-1350
(425) 378-4000

Douglas I. Brandon
Vice President - External Affairs
David C. Jatlow
Vice President - Federal Regulatory Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
Fourth Floor
Washington, D.C. 20036
(202) 223-9222

John F. Clark
Zachary A. Zehner
Keith R. Murphy
Perkins Coie LLP
Counsel
607 Fourteenth Street, NW Suite 800
Washington, DC 20005-2011
(202) 434-1637

Dated: September 8, 2003

CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS	)))))	WT Docket No. 03-128

To: The Commission

JOINT REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC., T-MOBILE USA, INC. AND WESTERN WIRELESS CORPORATION

Introduction and Summary

AT&T Wireless Services, Inc. ("AWS"), Western Wireless Corporation ("Western") and T-Mobile USA, Inc. ("T-Mobile") (collectively "Joint Commenters") reply to the comments filed in response to the Notice of Proposed Rulemaking ("NPRM") in this proceeding.[1] Joint Commenters submit this reply to emphasize their unified support for a final Nationwide Programmatic Agreement ("NPA") that truly streamlines the Section 106 process.

No commenter to this proceeding supports every provision of the draft Nationwide Programmatic Agreement ("Draft NPA"). Some dissent is quite strong. Nevertheless, Joint Commenters believe that overall, the comments express a general support for a programmatic agreement, but only on the condition that the agreement as a whole results in real streamlining of the Section 106 process.

---

[1] *See* Notice of Proposed Rulemaking, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, FCC 03-125 (rel. June 9, 2003).

Considering the wide range of interests represented in this proceeding, it is noteworthy that most commenters either expressed general agreement with, or voiced no objection to, several key principles that should guide the Commission. These principles include: (1) the need for the NPA to streamline the Section 106 review process; (2) the need for clearly defined time limits for review; (3) the need for clarification that fees for consultation are not justified; and (4) the need for consistent and fair application of the NPA to all parties.

In addition, most commenters expressly or impliedly support certain provisions of the agreement that are notable because they would change current requirements. AWS, T-Mobile and Western strongly support these provisions, including: (1) the definition of previously disturbed ground (Section VI.C.4); (2) guidance on the requirement for archeological surveys (Section VI.C.3); and (3) procedures that would allow applicants' findings of no effect to stand after 30 days without SHPO objection (Section VII).

Other issues addressed in the NPA proved more controversial and, not surprisingly, generated most of the significant comments, including: (1) the definition of an Undertaking and the scope of the NPA; (2) the assessment of visual effects and the appropriate determination of the area of potential effects ("APE"); (3) exclusions; and (4) requirements for tribal participation.

Addressing these contentious issues here, Joint Commenters urge the Commission to: (1) revisit the question of whether FCC actions identified in the Draft NPA are Undertakings under Section 106, and to affirm that Section 106 only covers properties actually listed in, or "determined eligible" by the Keeper of the National Register of Historic Places; (2) adopt a more limited and legally supportable approach towards assessing visual effects; (3) adopt clarified exclusions that are practical to use and streamlining in effect; and (4) reject proposals to permit parties or states to "opt-out" of exclusions with which they disagree.

Discussion

I. Principles of General Agreement

Joint Commenters note that certain principles underlying the Draft NPA and the Section 106 review process attracted strong support in the comments. These widely supported basic concepts include the four set forth below.

A. The Nationwide Programmatic Agreement Must Streamline the Section 106 Review Process

Virtually all commenters in this proceeding agree with AWS, T-Mobile and Western that the overriding goal of the NPA should be to streamline the Section 106 process for FCC Undertakings as much as possible, thus reducing compliance burdens on all parties, while maintaining protection for historic properties as required by the National Historic Preservation Act ("NHPA"). Support for this proposition is found in the comments of Indian tribes, historic preservation groups, SHPOs and industry alike.[2]

Many commenters agree that the Section 106 review of FCC Undertakings requires too much unnecessary and wasted effort.[3] In this regard, Joint Commenters remind the Commission that knowledgeable parties in the Telecommunications Working Group ("TWG"), including SHPOs and tribal representatives, reported that up to 95% or more of Section 106 reviews result in findings of "no effect" or "no adverse effect."[4]

---

[2] *See, e.g,* Comments of PCIA at 10-12; Comments of CTIA at1-3; Comments of USET at 3-4; Comments of Civil War Preservation Trust at 1; Comments of Massachusetts Historical Commission (SHPO) at 1.

[3] *See* Comments of PCIA at 6-12; Comments of AT&T Wireless Services, Inc. at 3-4; Joint Comments of Western Wireless Corporation and T-Mobile USA, Inc. at 2-4.

[4] As PCIA noted, "[i]n a 2002 meeting of the TWG, the Ohio SHPO reported on a survey their office had performed showing that more than 97% of Section 106 reviews of communications towers in that state resulted in findings of no effect. Other SHPO staff reported similar findings in their states." Comments of PCIA at 33 n.57.

AWS, T-Mobile and Western themselves have extensive experience with the unnecessarily broad scope of the Section 106 review process. The clear lesson from their experience is that this NPA should seek to reduce the unnecessary burdens of historic review and free compliance resources to focus on actual protection of historic properties. Unfortunately, some commenters ask the Commission to adopt provisions that would increase SHPO and tribal authority and responsibilities, not recognizing that the available resources to these entities are already stretched well beyond capacity under the current rules.[5] Joint Commenters urge the Commission to resist these suggestions, because they would unreasonably increase regulatory costs, burdens and delay, without conferring any real corresponding benefit to historic preservation.

Based on the obvious merit in, and the general agreement of the commenting parties on, this overarching principle, AWS, T-Mobile and Western urge the Commission to ensure that the final NPA improves and streamlines the Section 106 review process while guaranteeing the protection of historic properties, and to weigh each objection and proposed revision with this principle in mind.

B. Time Limits for Comment and Review Must Be Clearly Defined

Most industry commenters want clearly defined timeframes to apply to the various stages of Section 106 consultation and review, including a clearly understood and rigorously enforced 30-day time limit for review of proposed Undertakings.[6] With the exception of the Oregon SHPO, no commenter suggested that a 30-day review period was unworkable.[7] Most industry commenters want similar defined timeframes for the various stages of Section 106

---

[5] *See* Comments of Vermont SHPO at 1; Comments of USET at 1-4.

[6] *See, e.g,* Joint Comments of Western Wireless Corporation and T-Mobile USA, Inc. at 4-8; Comments of CTIA at 36-40; Comments of PCIA at 12.

[7] Comments of Oregon SHPO at 2.

consultation and review.[8] In addition, several commenters agree that the 30-day review period, in addition to applying to SHPO review, should be a limitation that applies to comments from the public, local government and Indian tribes, and should provide a clear end to the review process, as it does under current law.[9]

C. Fees for Consultation Are Not Justified

USET asserts that applicants should pay fees to other consulting parties for their consultation during the Section 106 review process.[10] No other commenter expresses support for this novel proposal. This lack of support is not surprising because the Advisory Council on Historic Preservation ("ACHP") made clear more than two years ago that applicants and agencies are not required to pay fees for consultation during Section 106 review.[11] There is simply no legal justification for requiring payment for consultation under the NHPA, and Joint Commenters believe that any such suggestion must be rejected.

---

[8] *See, e.g.,* Comments of CTIA at 36-40; Joint Comments of Western Wireless Corporation and T-Mobile USA, Inc. at 4-8; Comments of SBC Communications Inc. at 8.

[9] *See* Comments of Ameritech Mobile Services, Inc. at 3; Comments of Verizon Wireless at 11-12. Currently, under the ACHP rules, all consulting parties, including Indian tribes, must submit comments or objections within the 30-day review period that starts with the SHPO submission and notice to consulting parties. 36 C.F.R. §§ 800.5 (c)(2)(i) and (ii).

[10] *See* Comments of USET at 3-4.

[11] *See* Memorandum regarding Fees in the Section 106 Review Process, from John M. Fowler, Executive Director, Advisory Council on Historic Preservation, to Federal Preservation Officers, Tribal Historic Preservation Officers, State Historic Preservation Officers, Indian Tribes, (dated July 6, 2001) ("While the Council's regulations encourage the active participation of Indian tribes, they do not obligate Federal agencies or applicants to pay for consultation."); *see also Narragansett Indian Tribe v. Warwick Sewer Authority*, 2003 U.S. App. LEXIS 13497, *10 (1st Cir. 2003) (affirming district court's denial of claim for declaratory and injunctive relief requesting in part that the agency be required to pay tribal members fees for monitoring construction site).

D. The Terms of the NPA Should be Applied Consistently and Fairly

AWS, T-Mobile and Western support those comments urging the Commission to apply the terms of the NPA consistently and fairly for all parties in the Section 106 process.[12] Members of the industry, including Joint Commenters, understand that they will be required to comply with the procedures and specifications of the NPA and that other parties to the Section 106 process will be held to the same standard.

II. Streamlining Provisions Generally Supported

The following provisions of the draft NPA were generally supported, generating little or no objection.

A. Definition of Previously Disturbed Ground (Section VI.C.4).

With the sole exception of the Alabama SHPO, no commenters object to the definition of previously disturbed ground in Section VI.C.4, or to its application in the determination of when a project might be excluded for review for physical effects.[13] Significantly, neither the National Trust for Historic Preservation nor the National Conference of State Historic Preservation Officers ("NCSHPO") raise any objection to this definition.

The Alabama SHPO objects to the definition of previously disturbed ground, developed by consensus in the TWG through lengthy discussion and compromise, because "Alabama has archeological sites that are meters deep, and we remind you that historic burials are usually six feet deep."[14] The Alabama SHPO is correct. The TWG reasoned,

---

[12] *See, e.g.,* Comments of: USET at 11-24; Comments of Idaho SHPO at 2; Comments of O'ahu Council of Hawaiian Civic Clubs at 3-4. Joint Commenters do not necessarily endorse the specific enforcement procedures proposed by these commenters.

[13] *See* Comments of Alabama SHPO.

[14] *Id.*

however, that archeology that is deeper than the ground disturbance from a project will not usually be damaged by that project. The TWG further reasoned that although tower footings typically go deeper than two feet, the ground area of such deep disturbance, and thus the risk of hitting unknown deep archeological resources, is very small. In addition, the first-stage archeological surveys most often used as a screening tool by applicants, consultants and SHPOs, informally called a "shovel test," does not test for resources deeper than about two feet. It was for that reason that the TWG felt that requiring this type of prophylactic screening, as expensive as it is, should only be required in areas where archeological resources are known to be likely, and where the ground has not previously been disturbed, because in any event shovel testing would not protect unknown deeper resources.

Because the sole objection to the definition of previously disturbed ground in Section VI.C.4 is unpersuasive, AWS, T-Mobile and Western urge the Commission to adopt the definition as proposed in the Draft NPA.

B. Archeological Surveys (Section VI.C.3)

As with the definition of previously disturbed ground, Section VI.C.3 of the Draft NPA, which limits the need for an archeological survey when archeological properties are unlikely to be encountered, raised only a handful of objections. Only the Umatilla tribe and USET expressly object to this provision, on the ground that an applicant or a SHPO would only know if archeological properties were likely to be encountered if a survey was performed.[15] This objection, however, misses the point.

The survey to which the Draft NPA refers is an on-site survey using digging techniques. Experience has shown that such expensive surveys are not necessary in almost all cases. They should be required, not where archeological resources are absolutely known

---

[15] *See* Comment of Confederated Tribes of the Umatilla Indian Reservation at 2; Comments of USET at 22.

to exist, but only where they are known to be likely, and then only to determine if such archeological properties are likely to be damaged by new excavation. Joint Commenters note that some SHPOs currently require archeological surveys for every project, regardless of location, even for collocations.

Joint Commenters submit that a short-sighted and automatic requirement of archeological surveys for all communications projects is a good example of an unnecessary requirement that needs, but curiously resists, streamlining. The reason that the NPA should impose a limitation on the automatic use of archeological field surveys is that even though they have been shown to be unnecessary and unproductive in the vast majority of cases, SHPOs have no incentive not to require them. The surveys cost SHPOs nothing, and since they might provide some layer of comfort or protection against criticism – their lack of utility does not deter their use.

Since most commenting parties have no objection to limiting the use of archeological surveys as provided in Section VI.C.3, because experience supports the limitation and because the expressed objections are not substantially supported, the Commission should adopt this provision without revision.

C. Procedures (Section VII)

Commenters also generally appear to support the procedures for review contained in Section VII, since commenters either expressly support or are silent regarding its provisions. Significantly, this support extends to the provision of automatic acceptance of a finding of "no effect" where the SHPO does not object within 30 days of submission of a Submission Packet. In their comments, AWS, T-Mobile and Western suggest several minor revisions to the procedures in Section VII. These suggestions would implement the Commission's streamlining goals by clarifying those procedures and adding certainty to the Section 106

process.[16] The Commission should incorporate these revisions and adopt Section VII into the NPA.

III. Issues Generating Significant Comment

The following issues generated the most discussion and controversy in the initial comments.

A. Definition of Undertaking and Scope of the NPA

Several commenters, including PCIA, Sprint and CTIA, have challenged the Commission's determination regarding which actions constitute Undertakings to which the NPA applies.[17] Joint Commenters believe the Commission must reexamine whether the actions identified in the Draft NPA, including Attachment 2, are Undertakings, and articulate the reasons for its findings. In addressing this issue, the Commission should resolve Sprint's long-standing petition for clarification, which argues that none of the activities identified by the Commission can be considered Undertakings.[18]

AWS, T-Mobile and Western concur with the argument made by PCIA, AT&T Wireless Services, Maryland Department of Budget and Management and Fordham University, that Section 106 is limited by its terms and by congressional intent to only those properties listed in, or "determined eligible" for the National Register by the Keeper of the

---

[16] *See* Joint Comments of Western Wireless Corporation and T-Mobile USA, Inc. at 17; Comments of AT&T Wireless Services, Inc. at 17-18.

[17] *See* Comments of PCIA at 31-32; Comments of CTIA at 40-41; Comments of Sprint Corporation at 6-20. For instance, PCIA, Sprint, Verizon, Crown Castle, ATC, NAB, and CTIA argue that antenna siting is not a federal Undertaking. *See* Comments of PCIA at 31-32; Comments of Sprint Corporation at 6-20; Comments of Verizon Wireless at 3-6; Comments of Crown Castle at 5-8; Comments of ATC at 8-11; Comments of NAB at 2-5; Comments of CTIA at 40-41. In addition, PCIA, ATC, Sprint, and CTIA also argue that tower registration is not a federal Undertaking. *See* Comments of PCIA at 31-32; Comments of Sprint Corporation at 11-14; Comments of ATC at 8-10; Comments of CTIA at 40-41.

[18] *See* Sprint Petition for Reconsideration and Clarification, DA 00-2907 (May 2, 2001).

National Register.[19] Notwithstanding the contrary interpretation of the ACHP, it is clear that Section 106 itself does not apply to properties that merely meet National Register eligibility criteria. One reason supporting this position is that only the Keeper is authorized by law to make determinations of National-Register eligibility.[20]

B. Assessing Visual Effects and the Area of Potential Effect

Despite the Commission's streamlining goals, a number of commenters support the adoption of an even more expansive approach towards assessing visual effects and the determination of the APE. USET, for example, argues that Section 106 review should apply to any proposed facility that is at all visible from any historic property, no matter how distant.[21] Such a proposal makes little sense, where tribes are strained to review tower projects under much smaller APE standards in use now, and where we know that only a very small number of towers are ever found to cause an adverse effect, either by tribes or by SHPOs. Such an approach would significantly increase the regulatory burdens for SHPOs and applicants, to no apparent purpose, except to validate the most expansive possible interpretation of Section 106 authority, and would obviously not streamline the Section 106 process.

---

[19] *See* Comments of PCIA at 41-44; Comments of AT&T Wireless Services, Inc. at 14-16; Comments of Maryland Department of Budget and Management at 3; Comments of Fordham University at 14-20.

[20] The regulations of the National Park Service make clear that determinations of eligibility for inclusion on the National Register are the sole responsibility of the Keeper of the National Register. *See* 36 C.F.R. § 60.3(f) ("Keeper of the National Register - the individual who has been delegated the authority by the NPS to list properties and determine their eligibility for the National Register");36 C.F.R. § 60.3(c) ("Determination of Eligibility - a decision by the Department of Interior that a district, site, building, structure or object meets the National Register criteria for evaluation although the property is not formally listed in the National Register"). Applicants, SHPOs, tribes and others therefore lack authority to make any such determination. *See* Comments of PCIA at 42-44.

[21] Comments of USET at 22. USET also apparently argues that tribes should be able to determine the APE. Comments of USET at 21.

Furthermore, the approach towards the assessment of visual effects and the determination of APE should be rooted in the current law. As the comments of AWS, T-Mobile, Western and PCIA explain, under the ACHP's rules and the National Register's guidance, visual effects, like any other effects under Section 106, must alter the physical attributes of a historic property that qualify that property for the National Register.[22] In almost all cases, the APE of a tower is its footprint or area of physical ground disturbance. There is simply no support in the current law for the expansion of visual effects analysis under Section 106 to encompass all historic properties from which the tower may be visible.

Because visual effects analysis of a tower is often the most expensive, time-consuming, and contentious part of the process, AWS, T-Mobile and Western believe that a clear, reasonable, and workable approach to assessing visual effects, grounded in the current law,[23] is crucial and indispensable to the success of this programmatic agreement.[24]

C. Exclusions

Several commenters recognize that excluding certain Undertakings from Section 106 review, where such Undertakings pose little or no risk of adverse effects to historic properties and furthers the Commission's streamlining goals.[25] These commenters note that exempting such Undertakings permits all parties to more effectively focus their limited compliance

---

[22] *See* Comments of AT&T Wireless Services, Inc at 13, Joint Comments of Western Wireless Corporation and T-Mobile USA, Inc. at 14-16; Comments of PCIA at 39.

[23] *See* Comments of AT&T Wireless Services, Inc. at 7-14, Joint Comments of Western Wireless Corporation and T-Mobile USA, Inc. at 12-16.

[24] Joint Commenters strongly disagree with those commenters, such as the Vermont SHPO, that suggest the states should be permitted to define the APE. *See* Comments of Vermont SHPO. Under the ACHP rules, the authority to define the APE clearly rests with the agency, not the states. *See* 36 C.F.R. § 800.4(a)(1).

[25] *See* Comments of PCIA at 32-34; Comments of CTIA at 32-36; Comments of AT&T Wireless Services, Inc. at 3-7; Joint Comments of Western Wireless Corporation and T-Mobile USA, Inc. at 10.

resources on addressing the small number of communications projects that truly have adverse effects on historic properties.[26] To maximize potential efficiencies from properly framed exclusions, a number of commenters also underscore the importance of making exclusions succinct, easy to understand and apply, objective and self-executing.[27]

Commenters that criticize certain exclusions, or demand incorporation of "opt-out" provisions, often do so without explaining the precise nature of the unacceptable risk posed by the exclusion, and none propose substitute language or alternative streamlining solutions.[28] It appears that to the extent that exclusions are a necessary part of the Commission's streamlining plan, it will fall to industry and the Commission to constructively develop exclusions that will be acceptable.[29]

1. Modification and Replacement Tower Exclusions

Several commenters argue that the modification and replacement of towers should not be excluded from Section 106 review. They argue that any additional disturbance, however slight, may impact historic sites.[30] Similarly, the National Trust and Ohio SHPO assert that these towers should only be excluded if they have previously undergone a Section 106

---

[26] *Id.*

[27] *Id.*

[28] *See, e.g.,* Comments of USET at 16-19; Comments of Idaho SHPO at 1; Comments of Cheyenne River Sioux Tribe Telephone Authority at 2.

[29] Joint Commenters maintain that the Section 106 process should only apply to determined eligible properties. In the event the Commission determines that the process covers potentially eligible properties as well, as further discussed in section III.C.4., below, Section IX of the Draft NPA provides protection to previously unidentified archeological resources from all Undertakings, including excluded Undertakings.

[30] *See* Comments of O'ahu Council of Hawaiian Civic Clubs at 2; Comments of Seneca Nation of Indians at 2; Comments of Mississippi of Choctaw Indians at 1-2; Cheyenne River Sioux Tribe Telephone Authority at 2.

review.[31] Joint Commenters believe that these objections are misplaced for several reasons. First, as a number of commenters explain, modifications are not federal Undertakings subject to Section 106 review.[32] Second, these objections fail to credit that, as noted below, Section IX provides a safety net to protect any previously undiscovered historic property found during construction. Third, the benefits of excluding replacement towers from review far outweigh the associated risks.

Those opposing exclusion of replacement towers typically ignore that this exclusion offers significant environmental as well as streamlining benefits. Specifically, replacement towers have long been recognized as the network design element that most encourages collocation. This is because many older towers are not capable of housing multiple antennas. Replacement towers are often no taller than the towers they replace, yet they can often support two, four, or even more antenna arrays. A programmatic agreement that facilitates replacement towers thus encourages collocations, and thereby reduces the need for new towers.

In addition, permitting excavation up to 30 feet outside of the existing tower site is a practical and necessary provision to encourage the development of replacement towers. The accommodation of additional antennas often means the accommodation of additional shelters, and utility trenches, requiring additional physical space. Most replacement tower projects must expand, if only slightly, the boundary of a tower site designed for only one or two antennas. The 30-foot provision in the Draft NPA thus recognizes the realities of tower construction, and provides the flexibility necessary to truly encourage replacement towers.

---

[31] *See* Comments of National Trust for Historic Preservation at 1; Comments of Ohio SHPO at 1-2; *see also* Comments of John R. Welch (White Mountains Tribe).

[32] *See* Comments of AT&T Wireless Services, Inc. at 4-5; Comments of PCIA at 33; Comments of ATC at 11.

The TWG recognized the value of this provision and reached a consensus on the size of the expansion to be allowed. Industry representatives agreed that the 30-foot extension would work for most projects, and the preservation community representatives reasoned that the slight additional risk to underground historic properties was acceptable, given the benefit to be had from far fewer new towers being built in nearby locations.

Accordingly, the replacement tower exclusion should be adopted as proposed in the Draft NPA as a measure that will streamline the Section 106 process as well as protect historic resources.

2. Other Exclusions

A number of commenters also argue that the corridor, industrial area, temporary and emergency tower, and SHPO-designated exclusions, are overly broad, unnecessary, or a threat to historic properties.[33] As discussed in more detail below, these concerns should be ameliorated by the "safety net" of Section IX of the Draft NPA, which provides protection for historic properties uncovered during the construction of communications facilities, including those otherwise excluded from review.

Joint Commenters recognize that minor revisions to some exclusions are necessary in order to clarify their application and increase their effectiveness. AWS, T-Mobile and Western suggest several clarifying revisions in their comments, such as expanding the corridor exclusion to include railway corridors in use for all trains, not just passenger trains, and all limited-access highways.[34] These revisions should be incorporated into the Draft NPA as they effectively implement the Commission's streamlining goals.

---

[33] *See, e.g.,* Comments of USET at 16-18; Comments of O'ahu Council of Hawaiian Civic Clubs at 2; Comments of Seneca Nation of Indians at 2; Comments of Mississippi of Choctaw Indians at 1-2; Cheyenne River Sioux Tribe Telephone Authority at 2.

[34] *See* Comments of AT&T Wireless, Inc. at 6; Joint Comments of Western Wireless Corporation and T-Mobile USA, Inc. at 10-12.

Joint Commenters will support the proposed exclusions, insofar as the final versions of each are understandable, practical and truly streamlining in their application and effect.

3. "Opting-Out" of Exclusions

Several SHPOs and Indian tribes support an "opt-out" provision for certain of the proposed exclusions.[35] These "opt-out" provisions, however, would effectively negate the efficiencies to be gained from excluding certain Undertakings by requiring applicants to consult with tribes and other parties at the discretion of the tribe or SHPO. Allowing tribes and SHPOs to "opt-out" of the exclusions would revert the Section 106 process to the unmanageable state-by-state or tribe-by-tribe reviews the Draft NPA was designed to avoid.

Moreover, as noted by some commenters, Section 214 of the NHPA authorizes the exclusion of certain classes of Undertakings as an unqualified exemption from Section 106 review.[36] The ACHP's rules do not provide for any exceptions to excluded Undertakings based on the class of the consulting party, as the commenters propose.[37] Plainly, a Section 106 review system that requires applicants to track which states or consulting parties have

---

[35] *See, e.g.,* Comments of National Trust for Historic Preservation at 3 (supporting NCSHPO draft language inserting "opt-out" provision for railway corridors in active use for passenger trains); Comments of Vermont SHPO (arguing states should be able to opt-out of corridor exclusion); Comments of Civil War Preservation Trust at 2-3 (arguing states should be able to opt-out of industrial and railway exclusions); Comments of Maryland SHPO at 1 (supporting states' right to opt-out of corridor exclusion); Comments of Georgia Historic Preservation Division at 2-4 (supporting opt-out provision); Comments of SHPO Massachusetts Historic Commission at 1-2 (supports being able to opt-out of industrial and corridor exclusions if certain guidelines for APE are not used); Comments of New Hampshire Division of Historic Resources at 2 (supports opt-out provision for corridor exclusion); Comments of Anne McCleave, Delaware State Historic Preservation Office (supporting retention of opt-out provision for railway corridor exclusion); Comments of USET at 16-19 (arguing exclusions should not apply to tribes or tribes must be able to opt-out); Comments of John R. Welch (White Mountains Tribe) (supporting opt-out provision).

[36] *See* Comments of PCIA at 14-15.

[37] *Id*.

"opted out" of which exclusions would be extremely burdensome and ultimately unworkable.

For these reasons, AWS, T-Mobile and Western urge the Commission to reject all such "opt-out" proposals.

4. Safety-Net Provision

Commenters criticizing or demanding the right to opt-out of exclusions do not credit Section IX of the Draft NPA. This section provides a "safety-net" protecting against inadvertent destruction for those rare instances when an applicant discovers a "previously unidentified site" during construction of a communications facility. This safety net also applies to projects excluded from initial review.

Specifically, Section IX.A. requires an applicant to cease construction immediately upon discovery of an unidentified historical site and to promptly notify the Commission, the SHPO/THPO and any potentially affected Indian tribe or Native Hawaiian Organization ("NHO"). Thus, if construction of a site falling within an exclusion uncovers a previously unknown archeological site, Section IX specifically provides protection. Furthermore, the procedures set forth in Section IX are in line with ACHP Rule 800.14(c)(6), which provides that an agency may require review of normally excluded Undertakings when "circumstances" require.[38] The notification provisions of Section IX ensure that both the Commission and interested tribal entities will be notified and consulted in situations where the "circumstances" of inadvertent discovery may require review despite the applicability of an exclusion.

---

[38] 36 C.F.R. § 800.14(c)(6).

D. Requirements for Tribal Participation

Along with several other commenters, AWS, T-Mobile and Western strongly support the active participation of tribal entities in the Section 106 process.[39] As sovereign nations, tribal entities deserve to be treated with the utmost respect and their rights under Section 106 must be fully recognized and supported. Some commenters assert that tribal consultation for this Draft NPA has been inadequate, arguing that consultation with each tribe is required.[40] Joint Commenters respectfully disagree with these assertions.

The FCC has publicized the Draft NPA and the NPRM, and sent copies of both to all federally recognized tribes and NHOs. The Commission has invited all to consult during the development of the Draft NPA. The Commission has sent its representatives around the country to tribal gatherings and meetings of tribal representatives to publicize the Draft NPA, its development process, and to encourage all interested tribes to consult with the Commission and make known their views on its provisions. Further, representatives of several Indian tribes and tribal associations, including the National Conference of American Indians ("NCAI") and National Association of Tribal Historic Preservation Officers ("NATHPO") participated in the development of the Draft NPA in the TWG, and the Commission engaged in significant direct consultation with USET, including consultation regarding USET's proposed Alternative B to Section IV.

Complaints that the FCC did not provide adequate consultation opportunities for the Collocation Programmatic Agreement are similarly inaccurate.[41] The Collocation Agreement

---

[39] *See* Comments of PCIA at 12-13; Comments of CTIA at 10-11.

[40] *See* Comments of USET at 5-8; Comments of National Association of Tribal Historic Preservation Officers at 1-3; Comments of Cheyenne River Sioux Tribe Telephone Authority at 1-3.

[41] *See* Comments of Confederated Tribes of the Umatilla Indian Reservation at 2; Comments of USET at 12.

is part of the NPA, attached as Attachment 1, and referenced several times in the NPA. Any substantive concerns regarding this component of the NPA could have been raised in this proceeding.

AWS, T-Mobile and Western commend the Commission for its efforts to encourage tribal participation, and to seek consultation with Indian tribes and NHOs, in connection with the development of both the Draft NPA and the Collocation Agreement.

Conclusion

For the reasons stated herein, and in consideration of the initial comments filed by AWS, T-Mobile and Western, the Commission should evaluate the record in this proceeding to ensure that the final NPA streamlines the Section 106 process and reduces the compliance burden on all parties -- regulators, Indian tribes and industry alike -- without reducing in any substantial way the protection of historic properties under Section106.

AWS, T-Mobile and Western have sought to assist the Commission in achieving this overriding goal for the NPA, in their respective comments, and in this submission.

Respectfully submitted,

/s/_____

Gene A. DeJordy
Vice President of Regulatory Affairs
Western Wireless Corporation
3650 – 131st Ave., S.E., Suite 400
Bellevue, WA 98006
(425) 586-8700

Thomas J. Sugrue
Vice President - Government Affairs
T-Mobile USA, Inc.
401 9th Street, N.W.
Suite 550
Washington, DC 20004

William J. Hackett
Director of Regulatory Compliance
Western Wireless Corporation
401 9th Street, N.W., Suite 550
Washington, DC 20004
(202) 654-5980

Dan Menser
Senior Corporate Counsel
Shannon Reilly
Corporate Counsel
T-Mobile USA, Inc.
12920 S.E. 38th Street
Bellevue, WA 98006-1350
(425) 378-4000

Douglas I. Brandon
Vice President - External Affairs
David C. Jatlow
Vice President - Federal Regulatory Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
Fourth Floor
Washington, D.C. 20036
(202) 223-9222

John F. Clark
Zachary A. Zehner
Keith R. Murphy
Perkins Coie LLP
Counsel
607 Fourteenth Street, NW Suite 800
Washington, DC 20005-2011
(202) 434-1637

Dated: September 8, 2003